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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-773

UNITED STATES LINES, INC., *Petitioner*

v.

SUN SHIPBUILDING & DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUN SHIPBUILDING & DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, United States Lines, Inc. (hereinafter "USL") respectfully prays that a writ of certiorari issue to review the Order of Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 5, 1978.

OPINIONS BELOW

The Order of the Court of Appeals not yet reported appears in the separate appendix hereto. The Memorandum and Order of the District Court for the Eastern District of Pennsylvania dated November 1, 1977 is reported at 439 F. Supp. 671 (1977) and appears in the separate appendix hereto (143a-161a) along with a related but unreported preliminary Memorandum and Order of that District Court dated February 16, 1977. (130a-140a).

The related administrative decision of the Maritime Subsidy Board and the modification ordered by the

Secretary of Commerce is reported in Volume 12 of the *Pike and Fischer, Shipping Regulation Reports* at 12 SRR 551 (1971) and 887 (1972) and appear in the separate appendix hereto (Board 23a-111a, Secretary 112a-118a).

The related opinions of the United States Court of Claims in *Sun Shipbuilding and Dry Dock Co.* v. *United States,* are not reported but appear in the appendix (119a-128a).[1] The Memorandum of the U.S. District Court for the District of Columbia in the related case of *United States Lines, Inc.* v. *Secretary of Commerce et al.,* is not reported but appears in the appendix along with the October 28, 1977 order of that Court transferring the matter to the District Court for the Eastern District of Pennsylvania. (180a-187a).

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered September 5, 1978. (176a). A timely petition for rehearing *en banc* was denied on October 3, 1978, (177a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a District Court may entertain a government contractor's collateral attack upon a final decision of the United States Court of Claims and essentially reverse the Court of Claim's prior adjudication by a second and erroneous interpretation of the payment obligations under the contract with complete dis-

[1] Dismissal without published opinion of Count II of SUN's petition to the Court of Claims is reported at 538 F. 2d 348 (Ct. Cl. 1976).

regard for the Court of Claim's prior determination of when payment obligations could arise under the contract.

Whether the express terms of a standard tripartite government contract may be reformed by a district court *sua sponte* to make disputed change cost claims "payable" with pre-judgment interest five years prior to the completion of the mandatory administrative disputes process which the parties agreed would be the earliest point in time that such change costs could become "payable" under the contract.

Whether, in the admitted absence of a claim for breach of contract, this Court's decision in *Crown Coat Front* v. *United States,* 386 U.S. 503, (1967) fixing the completion of a mandatory disputes process as the time at which a government contractor's claim first accrues may be avoided to allow the award of prejudgment interest prior to that date of first accrual of the cause of action.

Whether the limits on change cost claims under standard government contracts as enunciated by this Court in *United States* v. *Rice,* 317 U.S. 61 (1942) and *United States* v. *Blair,* 321 U.S. 730 (1944) may be avoided without regard for the language of the contract involved, thereby retroactively increasing the measure of compensation for accomplished changes to include delay associated claims for non-change work.

Whether a federal court in the exercise of diversity jurisdiction may disregard and go beyond the well established limits of state law to create an obligation to pay on terms contrary to the express payment provisions of the standard government contract involved.

STATEMENT OF THE CASE

On October 10, 1962, a tripartite construction contract for the building of 5 vessels was executed by United States Lines, Inc., SUN Shipbuilding Drydock and the United States of America. (1a)

The parties contracted for the completion of the basic contract work for $10,590,000 per vessel (an aggregate contract price of $52,950,000) (3a) with express contract provisions for change work, administrative determination of disputed change cost claims and the time for payment of change costs.

During the course of construction, USL and the Board initiated changes to automate the engineering plant and reduce crew quarters. Under contract Article 4, SUN estimated that it could accomplish both changes on all five vessels for $1,690,000. (25a and 26a) But, in November 1965, after late delivery of the vessels, SUN presented detailed estimates for change work, alleged costs of impact on unchanged work and alleged delay associated costs totaling $5,740,368. (26a-29a)

SUN received prompt and full payment from USL and the Maritime Administration for the basic contract price plus undisputed change costs. Also, USL voluntarily prepaid in 1966 an additional $651,444 representing 90% of its estimated share of *actual* change costs.

Not until December 1, 1969 did USL and SUN settle guarantee deficiency claims under this contract.

SUN's unsettled change cost claims became the subject of: a 1967 audit; a 1969 Contracting Officer's decision; a 1970 Examiner's recommended decision; a 1971 Board Decision (23a-111a) and review by the

Secretary of Commerce in 1972. (112-118a) SUN refused to accept as final under the contract any of these decisions including the Secretary's award of $3,070,547 on SUN's $6,688,895 claim.

In February 1972, the Maritime Subsidy Board presented to SUN and USL an addendum to adjust the Contract Price to reflect the full amount of the final award. USL executed this addendum but SUN refused.

On March 16, 1972, USL offered to pay: ". . . the amounts finally determined to be due by the Secretary of Commerce, in return for an appropriate release to United States Lines from SUN Shipbuilding and Drydock Co."

In 1973, SUN alleged by petition to the Court of Claims that payment was due to SUN under the contract as of February 1972, that USL was in default and that the Board was liable for USL's share. By Count II of its Petition, SUN also sought judicial review to increase the award from $3,070,547 to $7,000,000. The United States brought USL before the Court of Claims as a third party. USL interposed as defenses to SUN's claims that the final administrative decision was excessive. (123a-125a)

Count I, based on USL's alleged default, was disposed of by the Court of Claims May 1974, finding that USL was not in default because under the contract the award: ". . . cannot be viewed as a 'final' one to which plaintiff is entitled at this time as a matter of law." (119a-121a)

In an unsuccessful (122a) petition to this Court for certiorari to review that decision SUN admitted:

> ". . . in 1974 the Court of Claims decided that SUN still was not entitled to any payments on account

of change orders until its rights to the exact amount finally due was established as a matter of law."

* * *

"Under this interpretation, an approved estimate cannot be added to the contract price where a dispute is involved until the dispute has been settled, or judicial review exhausted."

SUN then filed (on August 7, 1975) the instant action against USL in the District Court for the Eastern District of Pennsylvania asserting federal diversity jurisdiction.

On May 28, 1976, the Court of Claims dismissed Count II of SUN's Petition (126a) and found:

"This disposition makes it unnecessary under the Court's *en banc* Order of May 31, 1974, [123a] to consider . . . the problem of so-called 'delay damages'. Since we affirm the administrative award without adding to it, . . . we need not reach (and we take no position on) those issues."

SUN's Petition for Certiorari to review this Order was denied November 29, 1976 (129a) [2] and in December, 1976 USL filed, in the District Court for the District of Columbia, to obtain Wunderlich Act review of the errors of law not reached. (*USL* v. *Secretary of Commerce et al.*, CA 76-2347).

On February 16, 1977, the District Court for the Eastern District of Pennsylvania found in accord with this Court's decision in *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, (1967), that SUN's cause of action

[2] After the denial of SUN's petition for certiorari, USL did not object to partial summary judgment for the unpaid balance of hardware costs without prejudice to USL's defenses of law. (141a)

against USL did not accrue until after the Board decision had been made. (135a-140a)

On September 21, 1977, the District Court for the District of Columbia found that USL was, under the contract and the Wunderlich Act, entitled to judicial review of the errors of law allegedly tainting the final administrative award (180a) and, that action was, on October 28, 1977, transferred to the District Court for the Eastern District of Pennsylvania. (187a)

On November 1, 1977, the District Court issued its decision reversing the Board's decision to the extent it had denied SUN's claims for prejudgment interest against USL, and affirming the Board's decision to the extent challenged by USL's defenses (143a). By Motion for Reconsideration, USL highlighted to the District Court the inconsistency between its February 16, 1977, finding that SUN had no cause of action against USL until 1972 and the award of prejudgment interest back to 1966, which motion was denied (173a) and judgment entered (175a).

USL filed a timely appeal to the U.S. Court of Appeals for the Third Circuit, which after oral argument, affirmed on September 5, 1978 ". . . for the reasons set forth in the District Court opinion. . .". (176a)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH A PRIOR FINAL ADJUDICATION BY THE U.S. COURT OF CLAIMS.

This Court has often resolved conflicts between the Court of Claims and the U.S. Courts of Appeal for the several circuits,[3] and has also recognized the impor-

[3] *United States* v. *Hopkins*, 427 U.S. 123, 124 (1976); *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 258 (1965); *United States* v. *Carlo Bianchi Co.*, 373 U.S. 709 (1963).

tance of the correct interpretation of standard government contract provisions.[4] Here the conflict is between two judicial interpretations of *the same contract* requiring a writ of certiorari to review the Third Circuit's erroneous disregard for the Court of Claims' prior adjudication of when disputed change costs could first become payable under this standard government ship construction contract.

1.) The Court of Claims Found That The Contract Payment Provisions Were Express and Enforceable.

In 1974 at SUN's insistence, the Court of Claims in an action to which USL was a third party found that USL was not in default of its payment obligations under this contract for refusing to pay SUN's February 1972 invoice for disputed change costs. (119a)

There can be no doubt that the parties sought and obtained a final and binding interpretation of the contract provisions to be fulfilled before USL would be obligated to pay its share of disputed change costs. The question presented to the Court of Claims by the Government's October 2, 1973 motion was:

> "Whether the United States Lines is in 'default' under Article 31 of the contract between the parties".

In its October 26, 1973 reply SUN stated:

> "Defendant's brief has narrowed the issue before the Court on these cross motions for summary judgment: Does 'Finally determined' as it appears in Article 4(e) of the General Provisions of the Contract mean final administrative determination or final judicial determination."

[4] *United States* v. *Rice*, 317 U.S. 61, 62 (1942); *United States* v. *Blair*, 321 U.S. 730, 731 (1944); *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 400 (1966); *Crown Coat Front Co. Inc.* v. *United States*, 386 U.S. 503, 509 (1967).

The Court of Claims dismissal of Count I of SUN's petition was plainly predicated upon the necessary finding that USL was not, and could not be found, in default of the express payment obligations of the contract unless and until *all* Wunderlich Act challenges[5] had been adjudicated. (121a)[6]

By reinterpreting the contract to make change costs payable within the twelve months after SUN's unsupported detailed estimate was submitted, the courts below have erroneously circumscribed the jurisdiction of the Court of Claims and mistakenly disregarded that court's final and binding determination of what was to be paid when under this contract. (*Edgar* v. *United States*, 171 F. Supp. 243, 245-8 (Ct. Cl. 1959); *United States* v. *Munsingwear Inc.*, 340 U.S. 36, 38, (1950)).

The district court's reasoning adopted without comment by the Court of Appeals is that:

> ". . . Count I of SUN's complaint in the Court of Claims had no relevance to the issue of SUN's right to interest against USL; it dealt only with the issue of whether USL had *defaulted* to the extent that the government would be required to satisfy USL's obligations." (Emphasis in original—154a)

It cannot be denied that SUN's cause of action in the Court of Claims was based upon the allegation that

[5] SUN alleged only that findings of fact were not supported by substantial evidence, whereas USL's defenses related to both findings of fact and errors of law under 41 USC 321 & 322.

[6] A second Order of the same date describes the limited third party jurisdiction being exercised. (123a)

USL was in default, and that therefore the government was obligated to assume USL's payment obligations under the contract. Each of the elements of collateral estoppel exist with respect to the Court of Claims' finding that, USL was not in default of the contract payment terms. Lack of a USL payment obligation under the contract was the identical question decided by the Court of Claims, and the precise issue raised by USL's defenses to SUN's claim for prejudgment interest in the subsequent district court action. The Court of Claims prior adjudication was a final judgment finding SUN's default allegation against USL to be without merit in an action to which both SUN and USL were parties.[7]

2.) The Courts Below Erroneously Refused To Reach The Merits Of USL's Collateral Estoppel Defense.

After acknowledging that a decision by the U.S. Court of Claims may raise a bar of collateral estoppel (154a and 155a) the opinion below mistakenly refused to consider the merits of USL's defense of collateral estoppel on the issue of when disputed change costs are "payable" under the contract.[8]

> "Without reaching the merits of the res judicata argument, I find that the issue considered by the Court of Claims has no relevance to these proceedings. The Court of Claims was considering only the issue of whether the decision was final such that USL had defaulted by refusing to make payments pending further appeals. Even if the court by its dismissal of Count I of Sun's complaint did hold that USL had not defaulted, that decision in no way determines that USL should not be liable for interest on the debt it in fact owed." (153a)

[7] *Blonder Tongue Lab, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 323 (1971); *Lynne Carol Fashions Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177, 1182 (3rd Cir. 1972)—a diversity action applying the law of Pennsylvania.

[8] This conflicts with the Third Circuit's decisions in *United States* v. *Silliman*, 167 F. 2d 607, 613-621 3rd Cir. 1948, cert. denied 335 U.S. 825 (1948); *Vanderveer* v. *Erie Malleable Iron Co.*, 238 F. 2d 510, 512 (3rd Cir. 1956), cert. denied 353 U.S. 937 (1957); *Murphy* v. *Landsburg*, 490 F. 2d 319, 321-323 (3rd Cir. 1973), cert. denied 416 U.S. 939 (1974).

This conclusion is based on two errors. First, the Court of Claims' limited jurisdiction to enter a judgment against a private third party does not restrict the scope of that court's jurisdiction to make the necessary contract interpretations required to dispose of a claim against the government. Such findings are not open to collateral attack in a second (albeit different) cause of action. (*Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 598, (1948)).

Both SUN, as plaintiff, and USL, as a third party, are bound by the Court of Claims' interpretation of the contract. *Petrovich* v. *United States*, 421 F. 2d 1364, 1370 (Ct. Cl. 1970) *Bowser Inc.* v. *United States*, 420 F. 2d 1057, 1060 (Ct. Cl. 1970)). The subject matter jurisdiction of the Court of Claims invoked by SUN, encompassed whether USL was then obligated to pay SUN since, without default of an existing obligation by USL, SUN had no recourse against the government.

Second, the Court of Claims clearly had jurisdiction to find that USL was in default and enter a money judgment against the United States as guarantor (with indemnity rights) for USL's share of the disputed change costs. The Court of Claims had jurisdiction to determine between and among *all* parties before that

Court the facts and law necessary to dispose of SUN's cause of action against the government.

Application of the doctrine of collateral estoppel does not hinge upon which side prevailed in the prior adjudication and it was error to disregard the Court of Claims' finding of no default. Absent default there is no principle obligation to pay upon which prejudgment interest may accrue.[9]

Had the opinion below reached the merits of USL's collateral estoppel defense it would have been compelled to conclude that the *identity of the issue* actually decided in the first action, and *not the remedy sought* in the second action, was controlling and barred SUN's claim for prejudgment interest because of the prior adjudication that USL was not in default.

THE SECOND INTERPRETATION OF THE CONTRACT IS PLAINLY ERRONEOUS.

1.) The Contract Expressly Fixed The Earliest Point At Which Disputed Change Costs Could Become Payable.

The opinion below recognizes that interest does not begin to run upon a debt until such time as the debt first becomes "payable" (150a) and also admits that when the amount involved first became "payable" is governed by the terms of the contract. (151a-153a) However, the lower courts plainly erred by concluding that:

> "Article 14 [the Guarantee Clause] of the contract clearly shows that it is intended to provide a formula whereby all transactions among the parties

[9] "It is clear that interest should not be awarded as damages unless the defendant is shown to have been in default." *Corbin on Contracts* at Section 1048, p. 292.

> are completed within one year of delivery of the final vessel". (151a)

To the contrary, other Special and General Provisions of the contract fully and specifically state the agreement of the parties as to how change costs were to be determined and then paid under the contract.[10]

Article IV of the Special Provisions of the contract entitled, "Payment of Contract Price", (4a) expresses the agreement of the parties on how and when the Contractor will receive payment of the contract price when adjusted. Paragraph (iii) of Article IV (d) includes the prerequisite that: ". . . the Board has determined that all disputes and claims under the contract have been settled or finally adjudicated . . .". (8a) Article 36 of the General Provisions (21a) states the mandatory procedures to resolve "any dispute" without a deadline for Board decisions.

The change clause, Article 4 of the General Provisions (14a), describes the steps required to adjust the basic contract price to cover the net change cost including the requirement that change costs be "Finally determined" before adjusting the contract price. (16a)

[10] As admitted in SUN's September, 1975, memorandum to the District Court:

> "Thus change order amounts do not become part of the contract price so that the Owner and the Government have an obligation to pay until the amount of change order has been 'approved' or 'finally determined.' "
>
> • • •
>
> "The Disputes Clause was invoked in this case (Complaint, paragraph 12), and SUN will prove (if there is any dispute) that the final MSB decision was made on September 21, 1971. It is therefore clear that the amount of the change order was not added to the contract price and U.S. Lines did not have an obligation to pay under the contract until September 21, 1971."

Article 31 of the General Provisions also fixes a Board decision as the earliest possible time to require payment of disputed change costs. (20a)

SUN did not submit its detailed estimate until after the ships had been delivered (27a), and the contract price had not been adjusted at delivery. Therefore, SUN's claims were in the category of "all other amounts payable to the Contractor" within the meaning of IV (d)(iii). That Article and Article 4(e) specifically provide that the contract price may not be adjusted and payment is not due until after any dispute has been "finally adjudicated" (8a) and/or "finally determined" (16a).

Since the Board decision was not final until February 15, 1972, (112a-116a), no payment obligation could have arisen before March 16, 1972.

2.) A Guarantee Clause Does Not Modify The Specific Contract Terms Governing Payment.

The reliance of the opinion below on Article 14 to impose a 12 month deadline on the disputes process is misplaced.[11] The alternative suggestion (152a) that USL could have avoided an interest penalty as the disputes process ran on by paying, based on SUN's 7 million dollar claim (of which 4 million was ultimately

[11] If SUN wished to assert that the disputes process was unreasonably delayed its remedy was a breach of contract action against the Board. See for example *Sun Shipbuilding and Dry Dock* v. *United States*, 461 F.2d 1352 (Ct. Cl. 1972) where SUN challenged the pace of the MSB's change cost disputes process. In response to SUN's allegation that "the Maritime Administration dallied too long" the Court concluded (with specific reference to the related SUN/USL dispute) that the Board was acting in a timely fashion. (461 F.2d at pp. 1358, 1359 and 1361)

found to be unsupported) is contra to the express payment terms of the contract requiring a Board decision on disputed change costs.

Article 14 is a materials and workmanship guarantee of six months and requires a final survey of the vessel to be conducted not later than six months after the guarantee period. (17a) If there is a dispute on guarantee items, it may go on for years as plainly demonstrated by the record in this case. It was not until December 1969 (4 years after delivery and 3½ years after the guarantee period expired) that SUN and USL settled guarantee deficiencies with respect to these vessels.[12]

By relying on Article 14 to make disputed change cost claims become "payable" on November 24, 1966, the opinion below ignored the plain and specific meaning of the contract, erroneously presumed ambiguity, and misconstrued the general guarantee provision to override the specific payment provisions.

THE LOWER COURT DECISION IS IN CONFLICT WITH THIS COURT'S DECISION FIXING THE TIME AT WHICH A CONTRACTOR'S CAUSE OF ACTION ACCRUES UNDER STANDARD GOVERNMENT DISPUTES CLAUSE.

This Court has recognized the importance of granting certiorari to review conflicting lower court interpretations of standard government contract disputes clauses and the rights and liabilities of parties under government-wide contract disputes procedures.[13]

[12] Article XIV(a) of the contract Special Provisions specifically provided that the disputes procedure of Article 36 would be employed to resolve disputed guarantee deficiency claims. (10a)

[13] *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 400 (1966); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 509 (1967).

Here the opinion below mistakenly interpreted the payment, changes and disputes provisions of this standard government contract to conclude that payment by USL was due November 24, 1966, and that hence prejudgment interest could be awarded from that date even though the mandatory disputes process was not completed until February 1972.

In *Crown Coat Front Co.*, this Court held that a contractor's right of action on a claim within the disputes clause first accrues at the time of the final administrative action:

> ". . . When administrative proceedings with respect to a contractor's claim subject to the disputes clause extend beyond the completion of the contract his right of action first accrues when the administrative action is final and not before . . ." (386 U.S. at 509)

By presuming that SUN could demand payment of disputed change costs prior to the 1972 Board decision and thereby awarding prejudgment interest for the period consumed by the administrative disputes process, the court below (152a-153a) failed to adhere to this Court's ruling on when a government contractor's cause of action first accrues. (*Crown Coat,* at 512, *See also, United States* v. *Joseph A. Holpunch Co.*, 328 U.S. 234, (1946).)

Furthermore, the allowance of prejudgment interest prior to the final administrative decision of SUN's disputed change cost claims is contrary to the District Court's earlier (February 16, 1977) order finding that SUN's cause of action *against USL* did not accrue until the completion of the disputes process. (135a-140a)

It should be noted that this issue was raised by USL with respect to SUN's claims in order to insure that *Crown Coat* was consistently applied in the several consolidated cases then before the District Court wherein SUN had asserted that USL's guarantee deficiency claims against SUN (on another government contract) first accrued at vessel delivery.

SUN admitted in its 1975 brief to the District Court:

> "The Disputes Clause was invoked in the case . . . It is therefore clear that the amount of the change order was not added to the contract price and *U.S. Lines did not have an obligation to pay under the contract until September 21, 1971. Obviously, no cause of action accrued before that date.*" (Emphasis added).

The subsequent November 1, 1977 finding that Article 14 required the settlement of all disputes within one year after delivery and made all disputed amounts "payable" at that time completely contradicts the February 1977 finding that under this contract SUN's instant cause of action did not accrue until after the final administrative decision.[14]

The same terms of a single contract may not be given two such opposed interpretations. Either SUN's action against USL is barred by the statute of limitations, or, no amount could be "payable" so as to allow prejudgment interest prior to the 1972 administrative decision.

The decision below erroneously imposes prejudgment interest as a penalty for following the standard government contract disputes process. The exercise of this

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[14] *See also,* the September 1977 Order in *USL* v. *Sec. of Commerce,* D.C.D.C. Dkt. No. 76-2347 describing the "cycle" of lawsuits between the parties to this tripartite government contract. (180a).

Court's powers of supervision is required to maintain the integrity and unhindered enforcement of the contract disputes process and to avoid chilling a party's right to defend against exaggerated change cost claims.

THE DISTRICT COURT'S ERRONEOUS PRESUMPTION THAT IT HAD DISCRETION TO AWARD INTEREST FROM 1966 IS NOT SUPPORTED BY EITHER THE LAW OF PENNSYLVANIA OR ANALOGOUS FEDERAL AUTHORITIES.

The opinion below departs from and goes far beyond the established law of Pennsylvania which permits the award of prejudgment interest as damages only when, and from the date that, a defendant has *breached* an obligation to pay money and/or a principle amount of damages arising from the breach of an express or implied contract obligation.

As recited by the Pennsylvania Supreme Court in *Penneys* v. *Pennsylvania R.R. Co.*, 408 PA. 276, 183 A.2d 544, 546 (1962), Section 337(a) of the *Restatement of the Law of Contracts* (1932) provides the controlling rule of law on when interest is recoverable as damages:

> "If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable *as damages for breach of contract* as follows:
>
> (a) When the defendant *commits a breach* of contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value *from the time performance was due,* after making all the deductions to which the defendant may be entitled." (emphasis added)

In this diversity action the courts below were required to apply—not expand—the law of Pennsylvania with respect to prejudgment interest. However, the opinion below plainly errs in asserting that Pennsylvania law entitled the court to make a discretionary award of prejudgment interest in the undisputed factual context of this case.

The premise for this mistaken view of the applicable law is apparent at the outset of the opinion where, after citing authorities for the proposition that prejudgment interest should be awarded on a *liquidated* debt the court refuses to make a finding on whether or when SUN's claims were liquidated. Instead, the court shifts to an examination of the Pennsylvania law applicable where only the amount is unliquidated *but the obligation to pay as of a date certain is admitted or fixed as a matter of law or contract.* (146a & 147a)

Neither set of circumstances applies to SUN's claim for change costs under the contract since SUN's change cost claim was not liquidated prior to judgment, and was not due under the contract until either the 1972 final administrative determination [15] or the court's own on November 1, 1977 determination that USL was liable for delay associated change costs.[16] The contract terms, SUN's admissions, and the prior findings of the

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[15] The Board decision as upheld by the Court of Claims found that SUN's claims were not liquidated prior to the date the determination of the Board becomes final. (104a)

[16] In dismissing Count I of SUN's petition the Court of Claims found that the contract required the completion of *judicial* review of the Board's decision (119a)

District Court and the Court of Claims all dictate that the 1972 final administrative decision was the *earliest* point at which SUN's change claim could have become payable.

The second proposition asserted to support the existence of discretion to award prejudgment interest on an unliquidated claim is similarly not applicable. Again, no principle amount was payable under Pennsylvania law because, USL was not in breach of the contract either prior to the 1972 Board decision or prior to November 1, 1977.

SUN admitted in its June 1, 1977 Reply Brief:

> "... the legal basis for Sun's claim is not breach of contract but rather an implied right to interest *under* the contract. (emphasis in original)

The authorities, mistakenly relied upon by the courts below, involved the award of prejudgment interest on an amount which had become due as a debt or damages prior to judgment—circumstances not presented by SUN's claim against USL since, as SUN and the court admitted, USL was not in breach of contract.

Each of the Pennsylvania cases [17] giving rise to judicial discretion to award prejudgment interest involved a breach of contract (or tortious conduct) which by law imposed immediate liability on the defendant to pay

[17] *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 235 F. 2d 224 (3rd Cir. 1956); *United States* v. *Bethlehem Steel Corp.*, 113 F. 2d 301 (3rd Cir. 1940) aff'd 315 U.S. 289 (1941); *Prudential Insurance Co.* v. *City of Philadelphia*, Dkt. No. 73-1109 (E.D. Pa., October 24, 1975, Cahn, J.); *Weldon Kelley Co.* v. *Pavia Co.*, 354 Pa. 75, 46 A. 2d 466 (1946); *Gloeckler* v. *Imrie*, 118 Pa. Super. 441, 179 A. 2d 883 (1935); *Oxford Manufacturing Co.* v. *Cliff House Building Corp.*, 224 Pa. Super. 387, 307 A. 2d 343 (1973); *Lackawanna Iron and Steel Co.* v. *Lackawanna & Wyoming RR.*, 299 Pa. 503, 149 A. 702 (1930).

the principle amount of damages.[18] Given the express terms of the contract here involved the *earliest* point in time that USL could have been obligated to pay disputed change claims was the 1972 final administrative decision. Thereafter, the Court of Claims found that under the contract SUN's refusal to accept the administrative determination as final dictated that no amount became payable until judicial review was completed. The scope of federal court jurisdiction in diversity cases requires that the lower courts' venture beyond and contra to the established limits of the law of Pennsylvania on interest be reviewed and reversed by this Court.

The opinion below also refers to several federal cases as analogous authority for the court to award prejudgment interest without regard for the distinguishing fact that these cases involved contracts or statutes which made the disputed amounts payable upon the happening of a certain (accomplished) event.

For example, in *Ring Construction Corp.* v. *United States*, 209 F. 2d 668 (8th Cir. 1954) the event fixed by statute was the Secretary of War's unilateral determination of the amount of excess profits to be recovered from the war contractor (with an accompanying demand for repayment).

In *Swartzbaugh Manufacturing Co.* v. *United States*, 289 F. 2d 81 (6th Cir. 1961), the event fixed by a price renegotiation clause in the contract was the contracting

[18] Similarly, this Court's decision in *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924) allowed prejudgment interest only as damages for a *breach of contract*.

officer's unilateral determination that the contractor had been overpaid by the government.

By comparison, USL, SUN and the government had agreed that the Board, not the Contracting Officer, would adjudicate disputed change cost claims and that any net amount in favor of SUN would not become payable until 30 days after the Board had "determined the final contract price". (8a) [19]

APPLYING THIS COURT'S RULINGS IN THE *RICE* AND *BLAIR* CASES TO THE LANGUAGE OF THE CONTRACT INVOLVED REQUIRES A FINDING THAT DELAY ASSOCIATED CHANGE COST CLAIMS ARE NOT COMPENSABLE.

In defense of SUN's diversity action, USL was compelled to assert the errors of law by which the administrative decision had included delay associated cost claims for unchanged work in its 1972 award. By interposing these defenses based upon this Court's rulings in *United States* v. *Rice,* 317 U.S. 61 (1942) and *United States* v. *Blair,* 321 U.S. 730 (1944), USL did not abandon its direct action for a judicial review of these issues then pending before the District Court for the District of Columbia (*United States Lines, Inc.* v. *Secretary of Commerce,* CA 76-2347).

USL continues to maintain that Wunderlich Act review of errors of law contained in an administrative decision may not be accomplished by a collateral action to which the government decision-makers are not parties.[20] However, since the courts below found that the government was not a necessary party to SUN's action and undertook to determine USL's defenses, this petition seeks review of the conflicts between the lower courts' decision and this Court's decisions in *Rice* and *Blair* requiring express contract language to permit the award of delay associated cost claims.

The administrative award provided SUN with compensation for two types of costs: (1) "Hardware Costs"—the actual cost of materials and labor attributable to the changes, and (2) "Delay Associated Costs"—incurred in the performance of unchanged work, including delay in schedule, labor escalation, unabsorbed overhead, insurance, engineering disruption, production disruption, and congestion. (111a and 116a). Delay associated cost claims were allowed both prior and subsequent to the fixed contract delivery dates. (64a-72a and 115a).

1.) No Delay Associated Cost Claims Are Compensable Under The Contract.

The *Rice Doctrine* established by this Court requires that consequential costs flowing from delay to *unchanged work* are not compensable unless the contract so stipulates. (317 U.S. at 67) Here, the contract terms plainly limited SUN's compensation to actual change costs, plus allowed an equitable adjustment in the delivery dates to cover any delays.

[19] As the Board found:

"This fact that a demand for payment cannot be made until after a decision of the Board distinguishes this case from *Swartzbaugh Mfg. Co.* v. *United States,* 289 F. 2d 81 (6th Cir. 1961), relied on by Sun. In that case the Government under the contract could, and did, demand payment after the Contracting Officer's decision." (104a)

[20] 41 USC 322 (188a); On September 21, 1977, the District Court for the District of Columbia found that the government decision-makers cannot avoid defending their administrative decisions. (184a and 185a)

The Board's decision to view this as an oversight and belatedly construe the language of the contract to allow delay associated cost claims for unchanged work constitutes plain error in conflict with this Court's decision in *Rice,* which considered the proper interpretation of two clauses in that standard government contract. This Court found the two clauses (quoted below) [21] provided for cost increases to reflect actual change work with only an extension of time to adjust for change impact delays to unchanged work.

The *Rice* contract features are contained in the MarAd construction contract. Article 4(d) of the MarAd contract, (15a and 16a) concerning the "net increase or decrease in the cost of the contract work and probable delay in delivery of the vessel to result from such change" provides for the same adjustments as Articles 3 and 4 in *Rice.* MarAd Article 5(b) also covers the extension of time adjustment. (165a) The MarAd contract, as did the *Rice* contract makes a separate provision for the assessment of liquidated damages when an equitable adjustment of the contract delivery date is found unwarranted. (9a and 16a)

[21] "Article 3. *Changes.* The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. *If such changes cause an increase or decrease in the amount due under this contract,* or in the time required for its performance an equitable adjustment shall be made and the contract shall be modified in writing accordingly." • • •
(Emphasis added).

"Article 4. *Changed conditions.* Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, *and any increase or decrease of cost and/or difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.*" (Emphasis added).

As evidenced by the lengthy analysis contained in the Board's 1971 decision (48a-64a) the question of delay associated cost claims under this contract posed issues not fairly within the scope of change cost compensation as agreed to by the parties in 1963. Indeed, SUN's initial change cost estimate of $1,690,000 did not include a delay associated change cost factor. (25a-27a)

Although contract language may be changed to avoid the Rice Doctrine and to provide for delay associated cost claims for unchanged work, MarAd did not make such modifications to this contract.[22]

[22] For example: A 1958 revision of the standard government supply contract was considered in *Weldfab, Inc.*, IBCA No. 268, 61-2 BCA § 3121 where the Board concluded that the addition of the words "whether changed or not changed by any such order" was intended to—and did in fact—overcome the obstacles created by *Rice,* "so as to provide adjustment for costs incurred by reason of the issuance of change orders and affecting work which was not physically altered by the changes". *See* Spector, *An Analysis of the Standard Changes Clause,* 25 Fed. B. J. 177, 185 (1965), and O. S. Hiestand Jr., *A New Era in Government Construction Contracts,* 28 Fed. B. J. 165, 174 (1969) for other views attaching the same significance to the new language.

There are no material differences between the MarAd contract and the contract in *Rice*.[23] Thus, no basis exists for excusing the MarAd contract from the limitations on relief imposed by the *Rice* doctrine. *Rice* was the prevailing rule of interpretation of such language at the time this contract was executed, and the *Rice* doctrine must be applied to the language of the contract and the facts of this case.

Rather than decide the issue of law presented, the District Court upheld the Board's decision not to apply the *Rice* doctrine to SUN's claims by deferring to the Board's expertise and presuming that:

> "The *Rice* case in recent years has not met with favorable reaction by the Court of Claims and there is serious doubt whether it could be upheld in full by the Supreme Court today." (157a)

Any modification to the well established and long standing government contract principles enunciated by this Court in the *Rice* case should be made by this Court and then only for prospective application.

2.) Delay Associated Change Cost Claims For Unchanged Work Arising Prior To The Fixed Contract Delivery Dates Are Not Compensable Under The Contract.

The final administrative award to SUN includes delay costs claimed by SUN for a fifteen-day period prior to the fixed contract delivery dates for each vessel. The number of days and daily costs are facts determined by

[23] The "changes" clause of the standard form fixed-price Government construction contract, was not revised until 1968 and then by the same language that had been inserted in the standard supply contract—which does not appear in this MarAd Contract. (32 CFR § 7.602-3 and 32 CFR § 7.103-2)

the administrative decision [24] as affirmed by the Court of Claims. However, the legal issue of whether SUN is entitled to recover such predelivery contract date delay costs under *United States* v. *Blair*, 321 U.S. 730 (1944) was not reached by the Court of Claims. (127a)

The issue of pre-delivery date costs is of course related to the recovery of delay associated costs. If, the *Rice Doctrine* bars recovery for any delay associated cost claims, then no issue remains as to recovery of predelivery delay associated claims. However, even if recovery of some delay associated costs may be read into the contract, the question of recovery for delay associated costs claimed as a result of inability to complete performance *in advance* of the fixed delivery dates established in the contract requires separate analysis. (See, for example, the Board's two part discussion on *Rice* (48a-56a) and *Blair* (56a-64a)).

The issue in *Blair* and here is whether the contract contains any express obligation for completion of performance in advance of the fixed delivery dates.

In *Blair*, this Court found:

> "We are of the opinion, however, that nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date and that it

[24] It must be noted that while the Board found that there was no prohibition against claims for delay associated costs based on early delivery of the vessels (63a and 64a) it also found that SUN had failed to "sustain its burden of proving that it not only intended to delivery early but that it [SUN] would in fact have delivered the vessels prior to the scheduled contract delivery dates." (70a) This latter finding of failure of proof was reversed by the Secretary of Commerce. (114a and 115a)

> was error for the Court of Claims to award damages to respondent based upon a breach of this nonexistent obligation." (321 U.S. at 733)

Thus, *Blair* requires that before an obligation to pay pre-delivery date costs can be imposed, the intent to do so must be conveyed, and the language of the contract must explicitly state an obligation which is mutually enforceable.

In making its determination that precontract delivery date delay associated claim *could* be compensated (if proven) under this contract the Board admitted:

> "There is no precedent to support such recovery. In the context of the *Rice* doctrine and possibly of broader applicability, *United States* v. *Blair,* 321 U.S. 730 (1944), which has not been overruled, denied such recovery based on lack of explicit language in the contract to cover such costs." (59a)

The decision below erred by refusing to apply this Court's holding in *Blair* to bar recovery of SUN's claim for pre-delivery date delay costs.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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